

was held, with reference to an application for stay of execution pending appeal, that:

"Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas* case — 'Mercy is not the subject of legal rights. It begins where legal rights end.' Any stay of execution would be only an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with Article 42 of the Constitution."

In the present case the appellant's right ends after his appeal was dismissed by the Supreme Court and the death sentence confirmed. Mercy begins but mercy is not a legal right. In the case of *Chiew Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia* (*supra*), it was held that a decision made pursuant to an exercise of a royal prerogative of mercy cannot be varied or confirmed there being no jurisdiction to do so. In our judgment proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable. By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter. (See *Hanratty and Another v. Lord Butler of Saffron Walden*⁽⁷⁾).

In view of the foregoing, we see no justification to interfere with the learned Judge's decision. Accordingly, the appeal is dismissed. Both the order to strike off the statement of claim and to dissolve the order for stay of execution are confirmed.

In the light of our decision, the motion for stay of execution is dismissed.

The deposit of \$500/- paid into Court by the appellant shall be paid out to the respondents as costs.

Appeal dismissed.

Solicitors : *Karam Singh Veriah & Co.*

SAW POH WAH v. OOI KEAN HANG & ANOR. (ASIA INSURANCE CO. LTD. as THIRD PARTY)

[O.C.J. (Syed Agil Barakbah J.) January 16, 1982]

[Alor Star — Civil Suit No. 528 of 1977]

B *Tort — Negligence — Claim by lorry attendant against driver and owner for damages — Consent judgment against defendants — Defendants claiming indemnity against insurer — Whether insurer liable.*

C *Insurance law — Consent judgment for plaintiff against defendants — Defendants claiming indemnity against insurers — Terms of policy — Coverage — Exceptions — Construction — Whether insurer liable to indemnify defendants — Road Traffic Ordinance 1958, ss. 2, 74(i) & 75.*

D The plaintiff claimed against the defendants for damages for personal injuries and consequential losses suffered by him due to the negligence of the first defendant as the servant or agent of the second defendant in driving a motor-lorry. The plaintiff was at all material times employed by the second defendant, the registered owner of the vehicle, as an attendant. The first defendant was employed by the same as driver. By consent the plaintiff obtained judgment against the defendants for the sum of \$65,000/— in damages together with interest and costs to be taxed. **E** The defendants filed a claim against the Third Party, the insurers of the lorry, for whatever damages and costs which the defendants may be called upon to pay the plaintiff.

The said motor lorry had a "C" Carrier licence and was insured with Third Party Risks. Section II of the insurance policy dealt with "Liability to Third Parties". The issue before the Court depended on the true construction of Section II and the exceptions (ii) and (iii) of the policy. **F**

Held: (1) the liability of the driver, the first defendant, to the injured employee, the plaintiff, was covered by the insurance policy by virtue of Section II paragraph 2;

G (2) the Third Party should therefore indemnify the defendants on the judgment entered for the plaintiff and pay the costs of third party proceeding to the defendants.

[*Editorial Note:* The third party appealed against the above decision to the Federal Court, *vide* F.C.C.A. No. 32 of 1982. The appeal was heard before Abdul Hamid C.J. (Malaya), Wan Suleiman and Abdoolcader F.JJ. on November 21, 1984. Counsel for the appellant were Messrs. Khoo Eng Chin and Ong See Seng, while Mr. Lim Ewe Hock appeared for the respondents. The Federal Court allowed the appeal of the insurer, without delivering a written judgment which undoubtedly would be of great interest to the legal profession and insurance companies. The Federal Court held that there was no cross-appeal by the respondents against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger. As such the learned trial judge should have held that the exceptions to Section II of the Policy applied. Hence, the insurer was not liable to indemnify the defendants.] **H**

I

Cases referred to:

- (1) *Richards v. Cox* [1942] 2 All E.R. 624, 626.
- (2) *Chan Kum Fook & Ors. v. The Welfare Insurance Co. Ltd.* [1975] 2 M.L.J. 184.
- (3) *China Insurance Co. Ltd. v. Teh Lain Lee & Anor.* [1971] 1 M.L.J. 1, 3.

CIVIL SUIT.

Baldev for the plaintiff.

A. Jayadeva for the defendants.

Khoo Eng Chin for the third party.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The Plaintiff's claims against the defendants are for damages for personal injuries and consequential losses suffered by him due to the negligence of the first defendant as the servant or agent of the second defendant in driving motorlorry No. KA 4100 along Sg. Tiang/Pendang Road, Kedah on January 12, 1976. According to the Statement of Agreed Facts the plaintiff was at all material times employed by the second defendant, the registered owner of the vehicle, as an attendant. The first defendant was employed by the same as a driver. The said motorlorry had a "C" Carrier Licence Serial No. 179685 and was insured with Third Party Risks under Commercial Vehicle Policy No. GP 2/342952 issued by the Asia Insurance Company. The defendants have filed a claim against the said insurance company as Third Party for whatever damages and costs which the defendants may be called upon to pay to the plaintiff. By consent the plaintiff has obtained judgement against the defendants for the sum of \$65,000/- in damages together with interest and costs to be taxed. The only issue as agreed is whether the insurer has to indemnify the first and second defendants on the judgement entered for the plaintiff by virtue of the insurance policy taken up by the second defendant as the insured on the said motorlorry.

The undisputed facts of the case were that on January 12, 1976 the plaintiff whilst travelling as the attendant and in the course of his employment in the second defendant's lorry driven by the first defendant was injured when the said lorry went off the road and landed in a ditch due to the negligence of the first defendant in driving the said lorry. The lorry was authorised to carry timber owned by the second defendant under the carrier's licence (page 1 of Ex. B). The plaintiff was seated next to the first defendant in the driver's cabin at the material time.

A With regard to the main issue, I refer to the relevant provisions of the insurance policy filed in the Agreed Bundle of Documents (Ex. B). Section II deals with "Liability to Third Parties" and paragraphs 1 & 2 thereof state as follows:—

B "1 The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of:

- C** (a) death of or bodily injury to any person
(b) damage to property.

2. In terms of and subject to the limitations of and for the purpose of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver.

- D** (i) shall as though he were the Insured observe fulfil and be subject to the Terms of this Policy insofar as they can apply.
(ii) is not entitled to indemnity under any other policy."

E The policy also provides eight exceptions to Section II of which exceptions (ii) and (iii) are material.

"The Company shall not be liable in respect of

- F** (ii) death of or bodily injury to any person in the employment of the Insured arising out of and in the course of such employment
(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises ..."
- G**

H Construing Section II it is clear that the policy covers two different individuals *i.e.*, the main insured who, in this case, is the second defendant, and secondly, any authorised driver of the vehicle, who is the first defendant. It is also clear that the exceptions to Section II and in particular paragraphs (ii) and (iii) stated above refer to the main insured incurring liability for which a policy of insurance against third party risks is required for his own protection by virtue of Section 74(i) of the Road Traffic Ordinance 1958. The provisions of Section II and the exceptions (ii) and (iii) are included in the policy in compliance with the provision of Section 75 of the Ordinance. The Section reads:

"75 (1) In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —

- (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and
- (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover:—

- (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- (ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to person being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
- (iii) any contractual liability.”

The position is well explained by Scott L.J. in *Richards v. Cox*⁽¹⁾ as follows:—

“Counsel for the appellant has argued very strenuously that the provisoes to the first paragraph of Section II ... shut out the interpretation of the second paragraph ... My first answer is that those provisions seem to me to be addressed to the case of Dickerson Brothers incurring the liability and to the insurance of them for their own protection under the statute; but even if you read them as conceivably in some circumstances applicable to the case of the insurance of a driver authorised by them to drive the insured car, it does not seem to me that they are sufficient to affect the primary object of the quite separate para (2) which is the insurance of the driver.”

In so far as the second defendant who is the main insured is concerned, his claim for indemnity from the third party insurers cannot succeed because of the exceptions (ii) and (iii) to Section II. With regard to para (ii) the plaintiff at the material time was in his employment and suffered bodily injury as a result of the accident, arising out of and in the course of such employment.

As for para (iii) the words in brackets cannot refer to the plaintiff on the ground that at the material time the latter was not being carried as a passenger in the said vehicle although it seems that he was being carried “by reason of or in pursuance of a contract of employment”. The definition of “passenger” in relation to persons carried on a goods vehicle, under Section 2 of the Ordinance,

A does not include the driver or any attendant required by law to be carried on such vehicle. That an attendant shall be carried in the vehicle is stated at paragraph 6 of the carrier’s licence issued under the Ordinance to the second defendant (See Ex. B). The licence also contains special conditions allowing not more than two employees of the licence holder proceeding on his business to be carried in the said vehicle and not exceeding four persons including the driver and the attendant.

C The next step is to consider the provision of para 2 of Section II which covers a person other than the primary insured. To quote Scott L.J. in *Richards v. Cox (infra)* on page 626:—

D “... it is obvious that the various provisions in the policy applicable to the primary insured ... will not apply to the case of such other person. In my view the words “in so far as they can apply” mean that such of the terms, conditions and exceptions of Messrs. Dickerson’s insurance as are reasonably applicable to the insurance of their driver’s liability are incorporated in the latter’s cover; but in so far as they are not so applicable they are to be disregarded ...”

E It was held, *inter alia*, upon the proper construction of the policy the liability of the driver in that case to the injured employee was covered by the insurance and the insurance company, if a claim had been made, would have been bound to indemnify him, although the person injured was also in the employment of the principal insured.

F The *dictum* in *Richards v. Cox* was followed in the Singapore cases of *Chan Kum Fook & Ors. v. The Welfare Insurance Co. Ltd.*⁽²⁾ and *China Insurance Co. Ltd. v. Teh Lain Lee & Anor.*⁽³⁾

G The only difference in the present case from the cases cited is that the plaintiff was not travelling as a passenger while in pursuance of a contract of employment. In my considered judgement that point becomes irrelevant in the light of the primary object of para (ii) which is quite separate from para (iii) because it is a definite insurance of the driver against third party liability. There is no dispute that the first defendant was the authorised driver of motor lorry KA 4100 at the time of the accident, that all the relevant terms of the policy, in so far as they can apply, have been observed and fulfilled and he is not entitled to indemnity under any other policy. Further, the meaning of the phrase “Terms of this Policy” is explained in the words of the policy:

“Now this Policy witnesseth:—

That in respect of events occurring during the Period of Insurance and subject to the terms exceptions and conditions contained herein or endorsed hereon (hereinafter collectively referred to as the Terms of this Policy)."

It is also noted that the relevant provisions in the policy are *in pari materia* with those in *Richards v. Cox*. I hold that the liability of the driver *i.e.* the first defendant, to the injured employee *i.e.* the plaintiff is covered by the insurance policy by virtue of Section II paragraph 2. In the circumstances the Third Party has to indemnify the defendants on the judgement entered for the plaintiff and pay the costs of third party proceeding to the defendants.

Order accordingly.

Solicitors: *Triptipal Singh & Co.; A. Jayadeva; Sangara & Co.*

RE NKM HOLDINGS SDN. BHD.

[O.C.J. (George J.) October 18, 1984]

[Kuala Lumpur — Companies Winding-up No. 108 of 1982]

Company Law — Winding-up petition — Notice in Government Gazette to be published not less than 7 clear days prior to the hearing of petition — Date of publication — Late publication of winding-up petition in Government Gazette — Court has power to fix a new date of hearing — Company (Winding-up) Rules 1972, r. 24(a) — Companies Act, 1965, s. 221.

In this case a winding-up petition was filed by creditors against the Company and the hearing was fixed for December 12, 1983. Under the Companies (Winding-up) Rules, 1972, the petition had to be published in the *Government Gazette* not less than 7 clear days prior to the date of hearing. The *Gazette* of November 24, 1983 was put into circulation on December 12, 1983. A preliminary objection was raised on behalf of the company that the petition has not been advertised in the *Government Gazette* at least 7 clear days prior to the notice.

Held: (1) the requirement of rule 24(a) for publication in the *Government Gazette* 7 clear days prior to the date of hearing had not been met;

(2) despite the statutory presumption and the statutory *prima facie* position in view of the evidence given in this case there was no publication of the *Federal Gazette* of November 24, 1983 until December 12, 1983;

(3) the court has power to dispense with any notice and give such directions as it deems fit. A new date for hearing was fixed.

A [Editorial Note; A notice of appeal in this case was filed on November 8, 1984 under reference no. F.C.C.A. 277 of 1984.]

COMPANIES WINDING-UP.

B W.S.W. Davidson for the petition creditor.

P.S. Ranjan for the company.

Cur. Adv. Vult.

C George J. : The original petition to wind-up NKM Holdings Sdn. Bhd. was by one General Telephone Directory Co. Their petition was successfully opposed, the Court holding that the petitioner was not entitled to present the petition. The Court went on to accede to the application by Pan Malaysia Wood Sdn. Bhd. to be substituted as petitioner. The necessary amendments to the petition were duly made. It was fixed for hearing on the December 12, 1983 on which date Encik W.S.W. Davidson of counsel for the petitioners moved the petition. Encik P.S. Ranjan who appeared for the company informed the Court that he opposed the petition and that he had a preliminary point to take before going into the merits of the petition itself. I heard arguments on the preliminary point and reserved judgment.

F The preliminary point was that the Rule 32 certificate of the Companies (Winding-up) Rules, 1972 (all references to Rules in these pages are to those rules) should not have been issued by the Senior Assistant Registrar. It was contended that the requirements of Rule 24(a) had not been met in that the petition had not been duly advertised in the *Government Gazette* not less than 7 clear days prior to the date of hearing. Encik Davidson submitted that there were no merits in the objection.

H The memorandum of advertisement filed by the solicitors for the petitioner pursuant to Rule 21 is enclosure (27) in the Court file and is dated December 5, 1983. It states that the date of advertisement in the *Government Gazette* was November 24, 1983. Exhibited to the memorandum was a photocopy of what was purported to be the advertisement in the *gazette*. The date on it is November 24, 1983. On December 9, 1983 the Senior Assistant Registrar issued his certificate pursuant to Rule 32 signifying *inter alia* that he was satisfied that the petition had been duly advertised as required by Rule 24. In the face of Rule 21(c), section 61 of the Interpretation Act 1967 and section 81 of the Evidence Act 1950, the Senior